INDEPENDENT BAKERS ASSOCIATION
Post Office Box 3731, Washington, D.C. 20007

July 17, 2006

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: **Business Opportunity Rule, R511993**

Ladies and Gentlemen:

The Independent Bakers Association ("IBA") appreciates this opportunity to share with the Federal Trade Commission (the "FTC") our views on the proposed Business Opportunity Rule referenced above (the "Proposed Rule") and the accompanying Notice of Proposed Rulemaking (71 Fed. Reg. 19053, 4/12/06) (the "NPR").

IBA is a Washington, D.C. based national trade association of over 400 wholesale bakeries and allied industry trades. Most of our member businesses are family owned. IBA was founded in 1968 to represent and serve independent wholesale bakers.

1. Introduction

The goal of deterring fraud in business opportunity transactions is laudable. However, the Proposed Rule would regulate as "business opportunities" a wide range of legitimate distributorship and dealership arrangements that are not associated with the types of abuses at which business opportunity laws are aimed.

Further, and contrary to the assumption made in the NPR, the Proposed Rule would impose substantial regulatory burdens on product distribution in the United States. The FTC has not provided any justification—and there is no justification—for imposing those burdens on such a broad segment of the U.S. economy.

Consequently, as discussed more fully below, the FTC should either:

(i) withdraw the Proposed Rule, or

(ii) replace it with a more limited proposal that would cover the specific types of programs which the FTC has identified as problematic.

2. The Proposed Rule's Stated Purpose

In the NPR, the FTC expresses concern that the current "Franchising and Business Opportunity Ventures" rule[1] (the "Current Rule") does not cover certain business arrangements that have been the subject of consumer complaints and law enforcement activity. The FTC states that the Proposed Rule is intended to extend coverage to those arrangements. The FTC then identifies and discusses two such business arrangements: "work-at-home schemes" (such as craft assembly, envelope stuffing, and medical billing programs) and "pyramid marketing" (a/k/a multilevel marketing). 71 Fed. Reg. at 19057-19061.

The FTC provides evidence that work-at-home schemes and pyramid marketing have involved abuses. However, the FTC has not made any such showing for any other business arrangements that are not covered by the Current Rule.

The FTC may have made a case for regulating work-at-home schemes and pyramid marketing. However, the Proposed Rule's coverage is far broader.

3. The Proposed Rule's Coverage is Overbroad.

The NPR indicates that the FTC sought to fashion a rule that would target arrangements "which have been the source of most of the consumer injury," based on the FTC's enforcement experience and consumer complaints. 71 Fed. Reg. at 19057 (n. 39 and accompanying text). The Proposed Rule, however, casts a much wider net. The Proposed Rule apparently would regulate almost every type of product distributorship or dealership, except franchises.

The Proposed Rule would apply to "the offer for sale, sale, or promotion of a business opportunity. . . ."[2] "Business Opportunity," in turn, is defined as:

. . . a commercial arrangement in which:

(1) The seller solicits a prospective purchaser to enter into a new business;

(2) The prospective purchaser makes a payment or provides other consideration to the seller, directly or indirectly through a third party; and

(3) The seller, expressly or by implication, orally or in writing, either:

(i) Makes an earnings claim; or

[1] 16 CFR part 436
[2] Proposed Rule Sec. 437.2.

(ii) Represents that the seller or one or more designated persons will provide the purchaser with business assistance.[3]

This definition is, to say the least, expansive. As the FTC states in the NPR, the Proposed Rule's coverage would be "much broader" than that of the Current Rule. 71 Fed. Reg. at 19055. In particular, we note that:

- The term "new business" in item (1) of the definition includes "a new line or type of business."[4] Thus, if an existing business acquires a new product line, that new product line could be deemed a "business opportunity" under the Proposed Rule.

- The Proposed Rule, unlike the Current Rule, does not include an exemption for payments made to the "seller" (i.e., the product supplier) for inventory at a bona fide wholesale price. 71 Fed. Reg. at 19055. Consequently, such payments would satisfy item (2) of the definition, and therefore could subject the recipient of the payments to coverage under the Proposed Rule.[5]

- Payments to third parties who are not affiliated with the "seller" apparently could also satisfy item (2) of the definition and thus trigger application of the Proposed Rule. See 71 Fed. Reg. at 19063 (indicating that this element of the definition could be met by a "payment to a third party with whom the seller has a formal or informal business relationship") (emphasis added).

- There is no minimum payment threshold. A $1 payment could trigger coverage. 71 Fed. Reg. at 19079.

- "Earnings claim" (item (3)(i) of the definition) is itself defined very broadly: "any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits."[6]

- If "business assistance" is provided, the Proposed Rule could apply even if no earnings claim is made—despite the fact that the FTC's "law enforcement history demonstrates that the making of earnings claims underlies virtually all fraudulent business opportunity schemes." See 71 Fed. Reg. at 19063.

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[3] Proposed Rule Sec. 437.1(d).
[4] Proposed Rule Sec. 437.1(k).
[5] The Proposed Rule and the NPR often speak in terms of the "sale" of a business opportunity. The product supplier is referred to as the "seller" of the business opportunity, and the distributor or dealer is referred to as the "purchaser" of the business opportunity. In our view those references are somewhat misleading, because they imply that a payment is made for the right to enter into a business. In fact, the Proposed Rule could apply even if no such payment is made.
[6] Proposed Rule Sec. 437.1(h)

- "Business assistance" (item (3)(ii) of the definition) is likewise given an extremely broad interpretation: "the offer of material advice, information or support to a prospective purchaser in connection with the establishment or operation of a new business." "Business assistance" would also include "providing, or purporting to provide . . . customers" for the products involved.[7]

Clearly, the typical product distributorship or dealership would meet the Proposed Rule's definition of "business opportunity." Typically, the distributorship or dealership does constitute a "new business" (or a "new line or type of business" for the distributor or dealer). In addition, presumably the distributor or dealer will make payments to the "seller" (supplier) for inventory. Thus, items (1) and (2) of the definition would be satisfied.

If items (1) and (2) of the definition are satisfied, the Proposed Rule would apply if the "seller" (supplier) "expressly or by implication, orally or in writing," either makes an earnings claim or represents that business assistance will be provided. As discussed above, "earnings claim" and "business assistance" are interpreted very broadly under the Proposed Rule.

As a practical matter, suppliers will find it difficult to enter into a business relationship with a distributor or dealer without at least discussing possible sales volumes or profit levels. Further, the "business assistance" element would almost always be met.

It would seem almost impossible to avoid providing material "advice, information, or support" to a distributor or dealer. It would be the rare supplier indeed who does not provide some material information to a distributor or dealer. In addition, even that rare supplier apparently would be covered if a distributor or dealer takes over a business with existing customers, because the supplier would be deemed to be "providing . . . customers."

The FTC asserts that its definition of "business opportunity" is " . . . intended to capture the sale of true business opportunities . . . ." 71 Fed. Reg. at 19063. In fact, however, that definition goes much further and covers almost every imaginable distributorship and dealership, except franchises. It would cover innumerable product distribution arrangements that have never been considered—by regulators, suppliers, distributors, or dealers—to be a "business opportunity." Nothing in the record of this rulemaking supports such a dramatic extension of regulatory coverage.

[7] Proposed Rule Sec. 437.1(c). "Business assistance" does not include "a written product warranty or repair contract, or guidance in the use, maintenance, and/or repair of any product to be sold by the purchaser or of any equipment acquired by the purchaser." However, almost any other meaningful contact or involvement would be subject to characterization as "business assistance."

Indeed, the Proposed Rule's coverage is much broader than that of the various state business opportunity laws. The state legislatures have limited the scope of those laws through appropriate exemptions and more circumscribed definitions. A table outlining certain relevant features of those laws (and of Model Business Opportunity Acts) is attached to this letter as Exhibit A.

4. The FTC Has Grossly Underestimated the Number of Affected Businesses.

In assessing the Proposed Rule's impact, the FTC estimates that the Proposed Rule would cover 700 "business opportunity sellers" that are not regulated under the Current Rule. That estimate includes 550 "work-at-home opportunity sellers" and 150 "multilevel marketing companies." 71 Fed. Reg. at 19080. While that number may be a reasonable estimate of the number of work-at-home opportunity sellers and multilevel marketing companies in the U.S., it is a gross understatement of the number of businesses that would be affected by the Proposed Rule.

An enormous variety of products in the U.S. are marketed and sold by distributors or dealers. Many IBA members sell their food products to wholesale distributors, who in turn resell the products to retail stores or other customers. Food and beverages, construction equipment, manufactured homes, electronic components, computer systems, medical supplies and equipment, automotive parts, automotive tools and other tools, petroleum products, industrial chemicals, office supplies and equipment, and magazines are just a few examples of products carried by distributors and/or dealers. Such products include many of the best-known brands in the U.S.

These legitimate distributorships and dealerships bear no resemblance to the work-at-home schemes and pyramid marketing plans described in the NPR. We suspect that the FTC may not have intended to take the drastic and unprecedented step of deeming such distributorships and dealerships to be "business opportunities." Nonetheless, the Proposed Rule would do just that.

Clearly, the actual number of affected companies would dwarf the FTC's estimate of 700. Thus, contrary to the FTC's assertions in the NPR, it seems very likely that the Proposed Rule would effect a substantial increase in overall industry compliance costs, as compared to such costs under the current regulatory structure.

5. The Proposed Rule Would Impose Unnecessary And Inappropriate Requirements On Product Suppliers.

In addition to grossly underestimating the number of affected businesses, the FTC has also understated the regulatory burden that would be imposed by the Proposed Rule. See, e.g., 71 Fed. Reg. at 19080. The FTC places great emphasis and reliance on the fact that the Proposed Rule's disclosure requirements are less extensive than the disclosure

requirements under the Current Rule. That comparison does not, however, establish that the Proposed Rule's requirements are insubstantial or appropriate.

In fact, the Proposed Rule would impose substantial burdens on product suppliers who sell to distributors or dealers. Some of the more significant burdens and problems in this regard are discussed below.

(a) "Legal Actions" Disclosure Requirements

The Proposed Rule would require disclosure of a broad range of legal actions involving the supplier, affiliates, officers, directors, sales managers, and other persons. Any action involving alleged "misrepresentation, fraud, securities law violations, or unfair or deceptive practices" over the prior 10 years would be included.[8] Apparently, even claims that had no relationship to distributors or dealers would have to be disclosed.

Even if an action were resolved in the supplier's favor, it would still have to be disclosed, and the supplier could not discuss that favorable resolution in the disclosure document. Thus, the disclosure document could easily give prospective distributors or dealers a false impression that the supplier has a history of defrauding "business opportunity purchasers." Further, suppliers would have to spend substantial time and resources questioning their employees, affiliates, etc. regarding any past claims that might be covered by this disclosure requirement, verifying that information, and drafting the disclosures.

(b) "Cancellation or Refund History"

The supplier would be required to disclose instances in which "purchasers asked to cancel their purchase or requested a refund."[9] This requirement would cover both oral and written communications. 71 Fed. Reg. at 19070, 19078. Thus, the supplier would be required to track all such communications from distributors or dealers that could be construed as a cancellation or refund request under the Proposed Rule.

Further, this disclosure item would make little sense in the context of the typical distributorship or dealership arrangement. In most cases, the distributor or dealer has the right to terminate the relationship without cause. If a distributor or dealer exercises that right, or discusses with one of the supplier's employees the possibility of exercising that right, has the dealer or distributor "asked to cancel their purchase . . . "? We frankly do not see the point of requiring suppliers to monitor and report those types of communications.

[8] Proposed Rule Sec. 437.3(a)(3)(i).
[9] Proposed Rule Sec. 437.3(a)(5).

(c) Confusing and Inappropriate Terminology

The disclosure document under the Proposed Rule would inform a prospective distributor or dealer that the disclosed information "can help you decide whether to buy a business opportunity." There are numerous other references to buying and selling a business opportunity in the document.

In many cases, the prospective distributor or dealer would find this language puzzling at best. "Buy a business opportunity" implies that the distributor or dealer is making a payment for the right to enter into a business. In reality, however, the distributor or dealer is not making any such payment—instead it's buying products from a supplier for resale. The inaptness of this language underscores the fact that legitimate product distributorships and dealerships should not be regulated as "business opportunities."

(d) "Earnings Claim" Requirements

As discussed above, the definition of "earnings claim" is very broad. In practice the supplier would almost always be deemed to have made an "earnings claim," and therefore would have to comply with Section 437.4(a)(4) of the Proposed Rule. That Section would require that the supplier provide an “Earnings Claim Statement” in the specified format. Suppliers would be required to devote substantial resources to preparing and updating these statements, and in complying with provisions such as the requirement to state “any characteristics” which may distinguish distributors or dealers who achieved the “represented level of earnings” from other distributors or dealers. See 71 Fed. Reg. at 19073.

(e) "References"

The supplier would also be required to provide names and contact information for "purchasers who purchased the business opportunity within the last three years." If there are more than 10 such "purchasers," the supplier could provide names and contact information for "the 10 purchasers within the last three years who are located nearest the prospective purchaser's location." Alternatively, the supplier could provide such information for "all purchasers nationwide within the last three years."[10]

Thus, the supplier would have to choose between providing names and contact information for all distributors and dealers appointed over the prior three years (which may constitute proprietary information), or customizing each disclosure document by determining and listing the 10 closest such "purchasers" with respect to each prospective distributor or dealer. The disclosure document also includes the potentially alarming

[10] Proposed Rule Sec. 437.3(a)(6)(i).

notice: "If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers."

(f) Overall Impact on Suppliers and Their Products

The requirements described above, and other provisions of the Proposed Rule such as the recordkeeping requirements, would have a significant impact on suppliers who sell to distributors or dealers. The Proposed Rule's disclosure requirements in particular would impose substantial costs on those suppliers. Such costs, of course, would then be reflected in the prices of products carried by the distributors and dealers. The FTC has provided no justification for imposing those costs on suppliers or on the myriad products carried by distributors and dealers.

The FTC's staff anticipates that "in many instances" companies will have to engage lawyers to assist in preparing and updating the disclosure document. That assumption is clearly correct. The Proposed Rule would provide substantial work for lawyers. On the other hand, the staff's estimate of the number of hours required to comply with the requirements (5 hours for initial compliance and 4 hours or less per year thereafter), is much too low. See 71 Fed. Reg. at 19081.

The NPR gives the impression that compliance with the Proposed Rule involves little more than checking some boxes on a form. In fact, however, gathering the necessary information, verifying that information, updating that information every quarter, and drafting the required disclosures and statements would involve substantial time and expense. Further, suppliers and their lawyers would spend a significant amount of time educating themselves and the suppliers' personnel about the regulation, and answering questions from puzzled distributors and dealers. We respectfully suggest that the NPR does not evince an appreciation of these facts.

In the NPR, the FTC repeatedly asserts that compliance costs under the Proposed Rule would be insubstantial. See, e.g., 71 Fed. Reg. at 19066, n. 131 (stating that such costs would be "minimal"). That conclusion is essential to the stated rationale for the Proposed Rule. In support of that conclusion, the FTC offers little more than the observation that compliance with the Proposed Rule would be less costly than compliance with the Current Rule. In our view, a much more rigorous cost/benefit analysis should be provided to justify such a sweeping expansion of regulatory authority.

6. The Proposed Rule Should Be Withdrawn or Substantially Revised.

As discussed above, on the basis of data indicating problems with work-at-home schemes and pyramid marketing, the FTC proposes to extend "business opportunity" regulation to essentially every distributorship and dealership that is not a franchise. While we have no doubt that this initiative is well intentioned, we also strongly believe

that it is fundamentally flawed. Accordingly, we recommend that the Proposed Rule be withdrawn.[11]

If the FTC nonetheless chooses to proceed with the Proposed Rule, the Proposed Rule should be revised so that its coverage is limited to the types of programs for which there is substantial evidence that regulation as a "business opportunity" is warranted.

At a minimum, the following changes to the Proposed Rule should be made:

(a) The "inventory exemption," as applied under the Current Rule, should be included.

Under the Current Rule, "voluntary purchases of reasonable amounts of inventory at bona fide wholesale prices for resale . . . " do not trigger regulation as a "business opportunity" or franchise.[12] This facet of the Current Rule is often referred to as the "inventory exemption."

In the NPR, the FTC expresses concern that the inventory exemption may exclude pyramid marketing schemes from the Current Rule. 71 Fed. Reg. at 19061. If there are problems with pyramid marketing, then the FTC may revise the regulation to specifically cover pyramid marketing. However, the FTC has provided no justification for scrapping the inventory exemption altogether. In particular, the FTC has not explained how there is potential for abuse if all substantial payments made to the supplier or its affiliates are for voluntary purchases of reasonable amounts of inventory at bona fide wholesale prices for resale.

The FTC has long recognized that in these situations purchasers can recoup their investment by reselling the inventory. The FTC has not provided a rational basis for changing its policy in this regard. Certainly such a change cannot be justified on the grounds of minimal compliance costs under the Proposed Rule because, as shown above, in fact those costs would be substantial. Accordingly, any regulation that emerges from this rulemaking should include the inventory exemption.

(b) A minimum payment threshold should be added.

In the NPR, the FTC stresses the need to strike an appropriate regulatory balance. See, e.g., 71 Fed. Reg. at 19055. In our view, a business opportunity rule which strikes such a balance must include a minimum payment threshold, below which the rule would not apply.

[11] We note that, to the extent that unfair or deceptive practices occur in connection with distributorships or dealerships that are not regulated as a franchise or a business opportunity, those practices are actionable under Section 5 of the FTC Act and comparable state laws.

[12] Interpretive Guides to Current Rule, 44 Fed. Reg. 49966, p. 49967

When the Current Rule was adopted in 1978, the FTC properly recognized that payments totaling less than $500 do not constitute a "significant financial risk."[13] In explaining its decision to omit a minimum payment threshold provision from the Proposed Rule, the FTC cites the reduced compliance requirements under the Proposed Rule, as compared to the Current Rule. 71 Fed. Reg. at 19078. However, as discussed above, the FTC has seriously underestimated the costs and burdens imposed by the Proposed Rule. Accordingly, the FTC cannot reasonably justify omitting the minimum payment threshold (or otherwise broadening regulatory coverage) on the grounds that the Proposed Rule's compliance costs are insubstantial. We therefore urge the FTC to include a minimum payment threshold, for non-inventory payments made to the supplier or its affiliates, of at least $500.[14]

(c) Payments to third parties who are not affiliated with the supplier should not trigger regulation as a "business opportunity."

Item (2) of the Proposed Rule's definition of "business opportunity" would be met if the "prospective purchaser makes a payment or provides other consideration to the seller, directly or indirectly through a third party."[15] In the NPR, the FTC states that this provision will prevent "fraudulent business opportunity sellers" from circumventing the Proposed Rule ". . . by requiring payment to a third party with whom the seller has a formal or informal business relationship." 71 Fed. Reg. at 19063 (emphasis added).

The foregoing language from the NPR suggests that the FTC may intend a major change in its longstanding policy with respect to payments made to third parties who are not affiliated with the supplier. The policy has always been that such payments do not trigger regulation as a business opportunity or franchise.[16] However, the NPR indicates that such payments could lead to regulation under the Proposed Rule if the seller has a "formal or informal business relationship" with the third party. The NPR does not give examples of complaints or enforcement activity relating to such payments, nor does it provide any other justification for such a major policy change. If in fact a supplier tries to circumvent regulation by having payments to it somehow funneled through a third party, the FTC would have little difficulty ignoring that subterfuge.[17] The FTC should maintain its historical policy here and should not adopt the nebulous "formal or informal business relationship" standard.

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[13] Interpretive Guides to Current Rule, 44 Fed. Reg. at 49968.

[14] According to the Consumer Price Index Inflation Calculator, $500 in 1978 dollars has the same buying power as approximately $1,500 today. (Bureau of Labor Statistics, www.bls.gov.) Thus, we believe that in fact a threshold greater than $500 would be appropriate.

[15] Proposed Rule Sec. 437.1(d)(2).

[16] See, e.g., Interpretive Guides to Current Rule, 44 Fed. Reg. at 49967; Advisory Opinion to A. O. Smith Harverstore Products, Inc. dated 8/11/82.

[17] See, e.g., Advisory Opinion to General Motors Corp. dated 8/17/79 (if dealer makes payments to third parties who in turn make payments to General Motors, then the Current Rule's "required payment" element is met).

It is important to realize that generally it is necessary for a distributor or dealer to acquire certain equipment or other goods (such as transportation equipment, or computer hardware or software) for use in the distributorship or dealership. If payments made to unaffiliated third parties for those items satisfy the definition's "payment" element, then that element would be satisfied for almost every product distributorship or dealership. Thus, the "payment" element of the definition would be rendered effectively meaningless.

For example, many product suppliers communicate with, and transact business with, their distributors or dealers via computer. In order to conduct such communications and transactions, it may be necessary for both parties to use the same type of software. For purposes of this discussion, assume that the software is provided by Oracle. The supplier, consequently, has a "formal or informal business relationship" with Oracle. In order to do business with the supplier, the distributor or dealer must acquire Oracle software. The NPR language cited above indicates that payments made to Oracle for such software could trigger application of the Proposed Rule. This absurd result underscores the soundness of the FTC's longstanding policy.

(d) Appropriate exemptions from coverage should be added.

As explained above, the Proposed Rule would cover legitimate distributorships and dealerships that have never been deemed a "business opportunity," and for which the FTC has provided no evidence of abusive practices that might warrant regulation as a "business opportunity." Clearly, such distributorships and dealerships should be excluded from any business opportunity rule.

Accordingly, if the FTC proceeds with the Proposed Rule, it should add one or more exemptions that would apply to such distributorships and dealerships. We note that (as shown on the table attached as Exhibit A) many state business opportunity laws, and both of the Model Acts, include exemptions for suppliers with a specified minimum net worth. The rationale for such exemptions, of course, is that a supplier with a sufficiently high net worth is not the type of fly-by-night operator which historically has been the subject of consumer complaints or enforcement activity. We strongly believe that any business opportunity rule should include such an exemption.

As reflected on the table attached as Exhibit A, several states exempt suppliers with a net worth of at least $1 million. Other states have adopted somewhat higher exemption levels. If the FTC feels that a relatively high exemption level is preferable, we would support an exemption for suppliers with a net worth of at least $5 million, or even $10 million or $25 million.

In our view, specified minimum net worth should be the sole criterion for such an exemption. Several states, and the National Conference of Commissioners on Uniform

State Laws, take this approach. This approach is simple and straightforward, and its rationale is sound. Suggested language for such an exemption is attached as Exhibit B.

However, if the FTC determines that additional criteria are needed, we would not object to one or more of the following elements being included in an exemption:

(i) right to use a registered trademark;

(ii) no compensation of dealer/distributor for recruiting other dealer/distributors; or

(iii) no unreasonable minimum purchase requirements.

7. Conclusion

Thank you for your consideration of IBA's comments on the issues raised by the Proposed Rule. Those issues are of critical importance to many of our members, and to the many other suppliers that sell products to distributors or dealers. If there is a public hearing or workshop on the Proposed Rule, we would like to participate.

Sincerely,

/s/ Nicholas A. Pyle

Nicholas A. Pyle
President

Exhibit A

Exemptions and Exclusions Under State Business Opportunity Acts and Model Acts

STATE	EXEMPTION/EXCLUSION	SECTION NUMBER
Alaska	Exemption for product inventory sold at a bona fide wholesale price; exemption for marketing plan that involves licensing a registered mark from seller with a net worth of at least $1,000,000	Section 45.66.220(5) Section 45.66.220(11)
California	Exemption for product distributorship that meets the following requirements: (A) Seller sells to purchaser who will resell principally at wholesale, (B) Purchaser is not required to pay a fee for the right to enter into the agreement and there are no minimum purchase requirements, (C) Seller is a business entity, (D) Seller has a net worth of at least $10 million, (E) Seller grants purchaser permission to use a registered trademark, (F) Distributor is not compensated for recruiting other distributors.	Section 1812.201(b)(10)(A)-(F)
Connecticut	Exemption for marketing plan that involves licensing a registered mark.	Section 36b-61(6)(D)
Florida	Exemption for marketing plan that involves licensing a registered mark.	Section 559.801(1)(a)(4)
Georgia	Exemption for marketing plan that involves licensing a registered mark.	Section 10-1-410(2)(A)(iii)
Illinois	Exemption for seller with net worth of at least $1 million.	Section 602/5-10(c)
Indiana	Exemption for seller with net worth of at least $5 million.	Section 24-5-8-1.5
Iowa	Exemption for marketing plan that involves licensing a registered mark if seller has net worth of at least $1 million.	Section 551A.1.2.(b)(3)

STATE	EXEMPTION/EXCLUSION	SECTION NUMBER
Kentucky	Relevant definition is narrower in scope than that of the Proposed Rule.	Section 367.801
Louisiana	Exemption for marketing plan that involves licensing a registered mark.	Civ. Code Section 1821(1)(d)
Maine	Exemption for marketing plan that involves licensing a registered mark.	Tit. 36, Section 4691.3.A(5)
Maryland	Exemption for marketing plan that involves licensing a registered mark if seller has net worth of at least $1 million.	Tit. 14, Section 14-104(a)(5)
Michigan	Exemption for marketing plan that involves licensing a registered mark.	Section 445.902(a)(iv)
Minnesota	Business opportunities covered by franchise law; relevant definition is narrower in scope than that of the Proposed Rule.	Section 80C.01, subd. 4(a)(3)
Nebraska	Statute excludes wholesale product distributorship that does not sell to the general public.	Section 59-1709
New Hampshire	Statute excludes distributorship that does not involve vending machines, racks, display cases, or similar devices	Section 3298.1(II)
North Carolina	Exemption for marketing plan that involves licensing a registered mark.	Section 66-94(4)
Ohio	Exemption for seller with net worth of at least $5 million and who had at least 25 purchasers conducting business at all times during the 5 year period immediately preceding the sale of the business opportunity plan or has conducted the business that is the subject of the business opportunity plan continuously for at least the 5 years preceding the sale of the business opportunity plan.	Section 1334.12(L)(1)-(2)
Oklahoma	Exemption for seller with net worth of at least $1 million.	Section 803(3)

STATE	EXEMPTION/EXCLUSION	SECTION NUMBER
South Carolina	Exemption for product inventory sold at a bona fide wholesale price; exemption for marketing plan that involves licensing a registered mark; exemption for seller with net worth of at least $10 million.	Section 39-57-20
South Dakota	Exemption for seller with net worth of at least $1 million.	Section 37-25A-3(3)
Texas	Exemption for seller with net worth of at least $25 million.	Tit. 4, Section 41.004(b)(7)(A)
Utah	Relevant definition is narrower in scope than that of the Proposed Rule.	Section 13-15-2
Virginia	Relevant definition is narrower in scope than that of the Proposed Rule.	Section 59.1-263(A)
Washington	Exemption for marketing plan that involves licensing a registered mark for which no consideration is paid (any amount paid for goods purchased at a bona fide wholesale price does not constitute consideration under this exemption).	Section 19.110.040(7)

MODEL ACT	EXEMPTION/EXCLUSION	SECTION NUMBER
Uniform Franchise and Business Opportunities Act adopted by National Conference of Commissioners on Uniform State Laws	Exemption for seller with net worth exceeding $5 million	Section 401(b)
Model Business Opportunity Sales Act adopted by North American Securities Administrators Association	Exemption for seller with net worth of at least $1 million; exclusion for marketing plan made in conjunction with licensing federally registered mark if seller has net worth of at least $1 million.	Section 200(C) Section 101(C)(2)(e)

Exhibit B

§ 437.8 **Substantial Seller Exemption**

(a) The provisions of this part shall not apply to the offer for sale, sale, or promotion of a business opportunity by a seller that:

(1) has a net worth of at least five million dollars ($5,000,000) according to the seller's audited balance sheet as of a date not earlier than the 18th month before the date of such offer for sale, sale, or promotion; or

(2) is at least 80 percent owned by another person who:

(i) in writing unconditionally guarantees performance by the seller; and

(ii) has a net worth of at least five million dollars ($5,000,000) according to an audited balance sheet as of a date not earlier than the 18th month before the date of such offer for sale, sale, or promotion.

(b) Upon written request from the Commission, net worth shall be verified by a certification to the Commission from an independent certified public accountant that the audited balance sheet reflects a net worth of at least five million dollars ($5,000,000). This certification shall be provided within 30 days following receipt of a written request from the Commission.

NOTES ON THIS SUGGESTED EXEMPTION:

- ***A supplier with a sufficiently high net worth is not the type of fly-by-night operator at which business opportunity laws are aimed.***
- ***This exemption takes a straightforward and simple approach. It would minimize administrative burdens.***
- ***The certification arrangement under paragraph (b) would permit the Commission to verify the seller's net worth, while enabling non-public companies to protect the confidential nature of their financial statements. California's Seller Assisted Marketing Plan Act includes such a certification feature. See California SAMP Act Section 1812.201(b)(10)(D).***
- ***Current Sections 437.8 and 437.9 of the Proposed Rule would be renumbered accordingly.***